



POLICE DEPARTMENT CITY OF NEW YORK

April 18, 2017

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Adan Munoz
Tax Registry No. 935372
Brooklyn Court Section
Disciplinary Case No. 2015-13312

Charge and Specification:

1. Said Sergeant Adan Munoz, on or about April 18, 2014, at approximately 1755 hours, while assigned to Narcotics Borough of Brooklyn Command and on duty, in the vicinity of [REDACTED] engaged in conduct prejudicial to the good order, efficiency, or discipline of the New York City Police Department, in that he entered said apartment without sufficient legal authority. *(As amended)*

P.G. 203-10, page 1, Paragraph 5 – PUBLIC CONTACT-PROHIBITED
CONDUCT

Appearances:

For CCRB/APU: Simone Manigo, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, New York 10007

For the Respondent: John D'Alessandro, Esq.
The Quinn Law Firm
399 Knollwood Road, Suite 220
White Plains, New York 10603

Hearing Date:

January 25, 2017

Decision:

Respondent is found Guilty

Trial Commissioner:

ADCT Robert W. Vinal

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on January 25, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Civilian Complaint Review Board (CCRB) Administrative Prosecutor offered the out-of-court statement of Person A. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

On April 18, 2014, Respondent was on duty, in plainclothes, assigned to the 75 Precinct Module of Narcotics Borough Brooklyn North supervising drug enforcement duties. His driver was Detective Joel Polichron. At about 1755 hours, they entered the basement apartment of the house at [REDACTED] ("the apartment"). Inside the apartment, Respondent supervised Polichron as he arrested Person A and Person B.

The arrest reports Respondent and Polichron signed regarding Person A and Person B were admitted into evidence. (CCRB Ex. 2). Both men were charged with having committed "INSIDE OF [REDACTED]" the crime of "CRIM POSS MARIHUANA 5th: PUBLIC," a class B misdemeanor under Penal Law section 221.10(1).

Person A's criminal record, which includes convictions for Robbery in the Second Degree and Criminal Mischief in the Fourth Degree, was also admitted into evidence. (Resp. Ex. A).

Person A,¹ at a recorded interview conducted at CCRB on May 1, 2014 (CCRB Ex. 1), stated that on April 18, 2014, he was the lawful tenant of the apartment and that he was present inside his apartment that afternoon with a number of friends “just playing some video games” and “chilling.” At one point his friend [REDACTED] Guzman left the apartment and went outside to speak to one of his friends in his car. Five to ten minutes later, Guzman reentered the apartment. About 30 seconds after another one of Person A’s friends, a man named Maxwell, left the apartment with his girlfriend, there was a sharp knock at the door. Because Person A had gone to the back of his apartment, Guzman answered the knock on the door. Guzman asked the police officers if they had a warrant and they told him that they did not and that they were there for one person and to move out of the way. An officer told him that he was not moving and so “they forced their way into the house.” When Person A asked “the head officer in charge” if he had a warrant, he replied, “No, and that he didn’t need no warrants from what he observed and he’ll talk to me in a few minutes.”

Person A asserted that “after they had all of us sitting down on the couch,” one of the officers “pulled me to the back and said, ‘I’m going to tell you...why I’m in your house and why I’m going to search it because you need to be mindful of the company that you keep and the things that they do.’” When Person A “asked him to explain that, he told me that he witnessed Guzman engaging in a transaction outside on the corner of the block and that he then saw Guzman enter the apartment.” Person A claimed that he asked the officer, “If you witnessed this, why you didn’t lock him up then and why you coming into my house 10 to 15 minutes later?” but the officer “didn’t give me no explanation for that. He just told me to go sit back down and started performing a search on the house” by going “in my room.” When the officer “came back

¹ Person A did not appear to testify at this trial. The CCRB Administrative Prosecutor stated that Person A has moved out of the basement apartment at [REDACTED] and no longer resides within the State of New York.

out...he told all of us to stand up and they started pulling out handcuffs and said for their safety and for our safety they're going to cuff all of us together but they going to take us not outside but put us into the hallway or somewhere where we'll be out of their way." Person A asserted that the officers "took us to the other side of the room in the hallway where we all stood out there and waited for approximately 15 minutes while they flipped and searched the whole house" but "they found no drugs whatsoever inside of the house."

Respondent testified that he and Polichron were driving in the vicinity of Vermont Street when a woman "flagged us down" and told them, "Those guys are up to the same things again. They're up there smoking again," which Respondent understood meant "smoking and using drugs." Although he did not know what men she was referring to, he "knew of the location" at [REDACTED] because arrests had previously been made there and because "we had a kite there." He explained that a "kite" (an investigation card or "I-card") is generated as a result of complaints made to 911 about drug use or drug sales at a particular address and that he was under a duty to "do a thorough investigation of the kite" and "to address what the complaint was" about "and to try to come up with a positive outcome towards it."

Respondent and Polichron drove to the house at [REDACTED] and "as we drove up, we could see across the street" that the "door was open to that spot where the lady was, addressing those guys were smoking weed and doing whatever they were doing." Respondent "jumped out of the car and I went over there." Respondent "approached the door. The door was open. As I stepped in, I announced my presence. As I announced my presence, I could see a male black who's sitting on the couch. He made a movement" reaching behind him "towards the inside of the couch. I'm thinking he's going for a gun." Respondent explained that he thought the male was going for a gun because "it is the 75 (Precinct). This is a spot where it's known for

drug use, drug sales. From my experience, wherever there's drugs, there might be a gun there. So I drew my firearm and I proceeded inside." Respondent was asked, "Prior to entering into the apartment did you make any observation of what was going on inside the apartment?" He answered that he saw four or five males "hanging out and smoking weed" and that he knew that what they were smoking was marijuana because he could smell it.

Respondent testified that when he first observed the males who were inside the apartment, he was standing at "the threshold of the door" and that he "stepped in" and "quickly grabbed the one gentleman who I saw his hands go behind his back inside the couch. I'm thinking he's reaching for a gun. We secured him. We secured...the apartment" and arrested two of the males. Respondent was asked, "What was your basis for entering into the apartment at that time?" He answered, "I was going there to address a kite that I had, you know, to tell these guys, 'Knock it off. Stop smoking weed or close the door. Your neighbors don't need to be subjected to your smoking weed. They don't need to smell this.' I was going to tell these guys to just knock off the nonsense. When I had entered, when I saw the gentleman reaching to his back, I'm thinking he has a gun. So I went in there to make it safe and tell these guys to stop their nonsense." Respondent was also asked, "What did you believe gave you the authority to go into that apartment?" He answered, "It was plain view. I saw these guys smoking weed in plain view from the threshold."

On cross-examination, Respondent confirmed that the two men who were arrested inside the apartment were arrested for possessing marijuana that was found inside the apartment. Respondent asserted that he was standing at "the threshold" of the entrance door when he saw a man "smoking weed" inside the apartment "in plain view" and so he "took a step in" and announced his presence. When Respondent was asked, "You understand that the plain view

doctrine requires you to have lawful access to the premises?" he answered, "If you tell me that, I'm going to say yes." He emphasized that he only "took a step in" and that he did not "walk all the way in" until he "saw the gentleman on the couch" put his hand behind his back and "that's when I drew my gun and went...further inside." Respondent explained that he had gone further inside the apartment because his observation of individuals "smoking weed" was "coupled with the gentleman putting his hand behind his back" which caused him to think "he's going for like a firearm." Respondent asserted that this sudden movement created "a safety issue."

Respondent agreed that the basement apartment at [REDACTED] was a private residence. He asserted that when he arrived there he smelled an odor of marijuana coming from the basement apartment; and that when he reached the threshold of the basement apartment and looked inside, he could see men smoking marijuana. When Respondent was asked whether the reason that he had walked into the apartment was because he wanted to place these men under arrest for marijuana possession, he answered, "I was going to tell these guys to like knock it off. Stop the nonsense. Close the door. Your neighbors don't want to smell this." When Respondent was then asked, "You had no intention on placing any of them under arrest?" He answered, "You know what? I really can't answer that now, you know." When Respondent was next asked, "So the reason why you walked into these peoples' home without any permission is to tell them to close the door?" he responded, "I was also going to address (the) kite there. I was going to tell them, 'We don't appreciate this. Your neighbors don't appreciate smelling weed every day.'" One of the men sitting on the couch then put his hands behind his back and inside the couch.

Respondent was confronted with statements he made at his CCRB interview. At this interview he stated that when he arrived at the entrance door to the apartment, "You know, the

door was open. I went inside, you know, the police -- as I go inside there was a male black. I don't know what his name was...but he was on the couch as I -- as I came in he (moved his) hands like so and he went like this...so then I drew my gun. I said, 'Let me see your hands. Let me see your hands.' He finally, like, showed me his hands. They were all glazed. They were smoking weed. They were all like high."

When Respondent was asked why he had drawn his gun and pointed it at the man, he answered "For my safety. I thought he could have a gun or something." When Respondent was asked, "Was there anything about him that led you to believe that he may have had a weapon on him?" he answered, "His movements." When Respondent was asked, "Why did you point your gun at him?" he answered, "For my safety, because I thought he was armed." Respondent agreed that the woman did not state that anyone had a gun and that he never saw a gun.

Analysis

It is charged that Respondent entered the apartment on April 18, 2014, without possessing sufficient legal authority to do so.

The transcript of Person A's interview at CCRB was offered as hearsay evidence at this trial (CCRB Ex. 1). Although hearsay is admissible at Department disciplinary trials and may form the sole basis for making findings of fact,² hearsay evidence is insufficient to support a finding of guilt in a disciplinary trial if the credibility of the hearsay declarant is questionable.³ Here, the believability of Person A's hearsay must be examined in light of his criminal record which includes convictions for Robbery in the Second Degree, Criminal Mischief in the Fourth Degree and three Disorderly Conduct convictions (Resp. Ex. A). Since Person A did not appear to testify at this trial, Respondent's attorney did not have the opportunity to question him

regarding whether the _____

² RCNY Title 38, 15-04(e)(1).

³ *Eppler v. Van Alstyne*, 93 AD2d 930, 462 NYS2d 320, 1983 NY App Div LEXIS 17824.

version of his encounter with Respondent and Polichron on April 18, 2014 that he offered at his CCRB interview was affected by his previous interactions with members of this Department as reflected in his criminal history.

Also, at his interview Person A admitted that when Respondent and Polichron knocked on the door of his apartment, he did not personally go the door to answer their knocks because he had “gone to the back” of the apartment. Person A stated that one of his guests had responded to their knocks, opened the door and conversed with the officers. Thus, Person A’s statements that the officers demanded that the guest “move out the way;” told the guest “that he was not moving;” and then “forced their way into the house;” may have been based on what his guest told him about the encounter at the door rather than his own personal observations. Since Person A did not testify at this trial, Respondent’s attorney was unable to question him about how much of his description of the encounter at the door was based on what his guest told him rather than what he personally saw and heard.

However, it is not necessary to reach a finding as to whether to credit any of Person A’s hearsay claims because I find that statements Respondent made at his CCRB interview and the arrest reports that he approved (CCRB Ex. 2), establish that he is guilty as charged.

It is a basic principle of Fourth Amendment law that when a police officer enters a residence without a warrant or valid consent, the entry is presumptively unreasonable.⁴ Here, Respondent acknowledged that he entered a private residential apartment without a warrant and without having received consent to enter, and he agreed that even though he “knew of the location because arrests had previously been made there” and because “we had a kite there,”

⁴ *Payton v. N.Y.*, 445 US 573 (1980).

these facts alone were insufficient to justify a warrantless, nonconsensual entry into the apartment on April 18, 2014.

Moreover, Respondent acknowledged that the woman who flagged him and Polichron down only told them that “guys” were “up there smoking again,” and that she did not provide them with any names or descriptions as to who the “guys” she had observed were. Respondent further acknowledged that neither he nor Polichron personally observed anyone smoking marihuana outside the apartment or entering the apartment in possession of marihuana.

Respondent’s awareness that he lacked sufficient information to establish probable cause that a person inside the apartment was in possession of marihuana, is reflected in his assertion during his testimony at this trial that when he approached the entrance door he had no intention of entering the apartment to arrest anyone inside for possession of marihuana. When Respondent was asked, “What was your basis for entering into the apartment at that time?” He answered, “I was going there to address a kite that I had, you know, to tell these guys, ‘Knock it off. Stop smoking weed or close the door. Your neighbors don’t need to be subjected to your smoking weed. They don’t need to smell this.’ I was going to tell these guys to just knock off the nonsense.” Respondent’s testimonial claim that he entered the apartment only to verbally chastise the occupants is inconsistent with his subsequent actions of supervising Polichron as he arrested Person A and Person B for possessing marihuana inside the apartment.

Respondent’s claim that he acted in good faith in entering the apartment is not supported by the arrest reports that he approved (CCRB Ex. 2) in which Person A and Person B were charged with Criminal Possession of Marihuana in the Fifth Degree under subdivision one of that offense. Although the arrest reports cite the “offense location” as being “inside” the apartment, Person A and Person B were charged with possessing marihuana in “public” (CCRB Ex. 2, p. 1).

An element of the crime of Criminal Possession of Marihuana in the Fifth Degree (under subdivision one) is that the arrestee possessed the marihuana “in a public place.”⁵ The Penal Law defines “public place” to mean “portions of apartment houses...not constituting rooms or apartments designed for actual residence.”⁶ Since it is not disputed that Person A’s apartment was a private residence, the apartment did not meet the definition of a public place. Thus, Respondent approved arrest reports charging Person A and Person B with having possessed marihuana in a public place when Respondent knew that neither he nor Polichron had observed either of them possessing marihuana in a public place. Respondent’s approval of what he knew or should have known were legally insufficient arrest charges belie his claim that he believed that his entry into the apartment was lawful. On the contrary, I find that Respondent’s own statements establish that his unlawful entry into the apartment was not merely a mistake based on a genuinely held good faith belief that he possessed sufficient legal authority to enter the apartment.

Respondent claimed that his entry into the apartment was justified under the plain view doctrine and by his safety concerns. At this trial when Respondent was asked, “What did you believe gave you the authority to go into that apartment?” He answered, “It was plain view. I saw these guys smoking weed in plain view from the threshold.” However, in contrast to his trial testimony, Respondent admitted at his CCRB interview that he was already inside the apartment when he first ascertained that a specific occupant had been smoking marihuana. At his CCRB interview, Respondent stated that when he arrived outside the entrance door to the apartment, “You know, the door was open. I went inside, you know, the police -- as I go inside there was a male black. I don’t know what his name was...but he was on the couch as I - as I

⁵ Penal Law section 221.10(1).

⁶ Penal Law section 240.00(1).

came in he...hands like so and he went like this...so then I drew my gun. I said, 'Let me see your hands. Let me see your hands.' He finally, like, showed me his hands. They were all glazed. They were smoking weed. They were all like high." (Tr. p. 35-36). Based on these statements at his CCRB interview, I reject Respondent's trial testimony that he saw men smoking weed in plain view, and a man on a couch reaching behind his back, while he was standing at the "threshold" of the entrance doorway.

Moreover, on cross-examination at this trial, Respondent indicated that he was unsure as to whether being lawfully present inside an apartment was a prerequisite in order for the plain view doctrine to apply. When Respondent was asked, "You understand that the plain view doctrine requires you to have lawful access to the premises?" he answered, "If you tell me that, I'm going to say yes." Uniformed members have been placed on notice by the Department's Legal Bureau that the plain view doctrine "is only applicable if an officer is in a place where he/she has a right to be when he/she observes the item."⁷ Since Respondent admitted at his CCRB interview that he was already inside the apartment when he determined that an occupant was smoking marijuana there, the plain view doctrine does not justify his warrantless entry into the apartment.

As to Respondent's claim that his entry into the apartment was justified by his safety concerns, he testified at this trial that when he was standing at the "threshold" of the entrance door, he saw the man on the couch make a sudden movement of reaching behind his back and because he was concerned that the man might be reaching for a gun, "I went in there to make it safe and tell these guys to stop their nonsense." However, as discussed above, since at his CCRB interview he stated that he was already inside the apartment when he observed a man on a couch

⁷ "Search and Seizure: The 'Plain-View' Doctrine," Legal Bureau Bulletin, Vol. 17, No. 6, page 2.

put his hands behind his back, his claim that he then became concerned for his safety does not justify his prior warrantless entry into the apartment.

Based on the above analysis, Respondent is found guilty of having entered the apartment without sufficient legal authority.

PENALTY RECOMMENDATION

In order to determine an appropriate penalty, Respondent's service record was examined. *See Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 1, 2004. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached Confidential Memorandum.

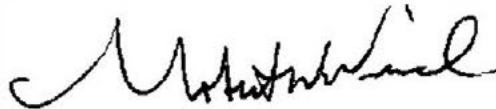
The CCRB Administrative Prosecutor recommended that Respondent forfeit seven vacation days as a penalty. The Administrative Prosecutor cited *Case No. 2014-11567* (Feb. 29, 2016), in which a captain was found guilty after trial of having entered an apartment without sufficient legal authority. In that case, although the Trial Commissioner recommended that the captain forfeit three vacation days as a penalty, the Police Commissioner increased the penalty to a forfeiture of seven vacation days. However, in that case, unlike here, the captain had a previous formal disciplinary adjudication and the Police Commissioner stated in his memorandum that a seven-day penalty was appropriate "in light of both the length and extent of the entry undertaken, and considering" Respondent's "level of responsibility in holding the rank of Captain."

Respondent here is a nearly 13-year sergeant who has no prior formal disciplinary adjudications. In *Case No. 2014-11569* (Sept. 10, 2015), a ten-year sergeant who had no prior disciplinary record forfeited three vacation days as a penalty after he was found guilty of having entered premises without sufficient legal authority. More recently, in *Case No. 2016-15036* (June 1, 2016), a 20-year sergeant who had no prior formal disciplinary adjudications forfeited

ten vacation days as a penalty after he pleaded guilty to a charge brought by CCRB that he had entered an apartment without sufficient legal authority. However, that ten day penalty also covered five other related CCRB charges: That he searched the apartment without sufficient legal authority; that he damaged the balcony door of the apartment; that he refused to provide his shield number to a civilian; that he wrongfully used force against a civilian; and that he spoke discourteously to an individual by stating, "I am the fucking police."

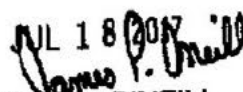
Therefore, it is recommended that Respondent forfeit five vacation days as a penalty.

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner Trials

APPROVED

JUL 18 2017

JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ADAN MUNOZ
TAX REGISTRY NO. 935372
DISCIPLINARY CASE NO. 2015-13312

Respondent received an overall rating of 4.5 on his 2016 and 2015 annual performance evaluations, and 4.0 on his 2014 annual evaluation. He has been awarded three Meritorious Police Duty medals and six Excellent Police Duty medals. [REDACTED]

[REDACTED] He has no prior formal disciplinary adjudications.

He was placed on Level 1 Force Monitoring on April 9, 2009 for having received three or more civilian complaints within a one year period. This Monitoring ended on November 25, 2009. He was placed on Level 1 Force Monitoring again on March 20, 2015 for receiving three or more civilian complaints within a year. This Monitoring ended on January 26, 2017. Also on January 26, 2017, Respondent was placed on Level 2 Discipline Monitoring which remains ongoing for charges and specifications.

For your consideration.

Robert W. Vinal
Assistant Deputy Commissioner Trials